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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

09-51900 By FAX

In re

CASE NO. ~~09-01500~~-ASW

BENYAM MULUGETA and PAULA R.  
MULUGETA,

Chapter 11

Debtor and Debtor in Possession

**OBJECTION OF LONE OAK FUND,  
LLC TO THE EXAMINATION OF  
WITNESS BY THE COURT ON  
BEHALF OF DEBTORS**

LONE OAK FUND, LLC,

Movant,

v.

BENYAM MULUGETA and PAULA R.  
MULUGETA

Respondents.

TO THE HONORABLE ARTHUR S. WEISSBORDT, UNITED STATES  
BANKRUPTCY JUDGE:

COMES NOW secured creditor Lone Oak Fund, LLC ("Lone Oak") and does  
hereby submit the following Objection to the Examination of Witnesses by the Court on  
Behalf of Debtors.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2  
3 **1. INTRODUCTION**

4 At the evidentiary hearing on February 16, 2010, the Court has repeatedly taken  
5 over examination of witnesses on behalf of debtors Benyam Mulugeta and Paula Mulugeta.  
6 Lone Oak recognizes that the court is generally permitted to interrogate witnesses pursuant  
7 to Federal Rules of Evidence, Rule 614(b). However, as set forth in the note to  
8 Subdivision(b) and case law interpreting the rule, the court may not assume the role of  
9 advocate and examine witnesses on behalf of a party. This rule applies where the party  
10 is acting in pro per and where the court is the trier of fact. Accordingly, Lone Oaks  
11 submits the instant brief to supplement its objections to the examination of witnesses by  
12 the Court.

13  
14 **2. THE COURT IS NOT PERMITTED TO ACT AS AN ADVOCATE FOR ANY**  
15 **PARTY AT TRIAL.**

16 Federal Rule of Evidence, Rule 614(b) does give the court permission to question  
17 witnesses at trial, stating: “Interrogation by court. The court may interrogate witnesses,  
18 whether called by itself or by a party.”

19 However, when questioning witnesses, the court is not permitted to act as an  
20 advocate for any party. The Advisory Committee Note to Subdivision (b) of Rule 614  
21 states, in pertinent part:

22 “The authority of the judge to question witnesses is also well  
23 established. (Citations.) The authority, of course, is abused  
24 when the judge abandons his proper role and assumes that of  
25 advocate...”

26 The Ninth Circuit Court of Appeals discussed this limitation on the court’s power  
27 to examine witnesses in *U.S. v. Bradshaw* (9<sup>th</sup> Cir. 1982) 690 F.2d 704, 711, stating:

1 "Fed.R.Evid. 614(b) acknowledges the judge's power to  
2 interrogate any witness appearing before him. This power has  
3 long been recognized as '(o)ne of the natural parts of the  
4 judicial function'. (Citations.) Although a trial judge may  
5 question witnesses to clarify and develop facts, he must never  
6 prejudice the defendant by assuming a partisan stance. *United*  
7 *States v. Medina-Verdugo*, 637 F.2d 649, 653 (9th Cir. 1980);  
8 *Rogers v. United States*, 609 F.2d 1315 (9th Cir. 1979)."  
9 See Also *U.S. v. Haro-Espinosa* (9<sup>th</sup> Cir 1979) 619 F.2d 789, 795. ["It is entirely proper  
10 for the court to question witnesses in order to clarify questions and develop facts, so long  
11 as questions are nonprejudicial in form and tone, and the court does not become personally  
12 overinvolved."]; *Logue v. Dore* (1<sup>st</sup> Cir 1997) 103 F.3d 1040, 1045 ["...[T]he judge's  
13 participation must be balanced; he cannot become an advocate or otherwise use his judicial  
14 powers to advantage or disadvantage a party unfairly. See *Quercia*, 289 U.S. at 470, 53  
15 S.Ct. at 699; *Paiva*, 892 F.2d at 159; see also Fed.R.Evid. 614(b) advisory committee's  
16 note."]; *U.S. v. Esquer* (7<sup>th</sup> Cir 1972) 459 F.2d 431.) ["A trial judge is at liberty to  
17 question a witness to clarify a particular point, and where, as here, he does so without  
18 engaging in advocacy or displaying prejudice or partiality, no error can be predicated upon  
19 such examination."])

20 Moreover, the Ninth Circuit has specifically disapproved of the court examining  
21 witnesses at trial on behalf of a party acting in pro per, stating:

22 "For the trial judge to assume the responsibility of examining  
23 witnesses for either party would change the judicial role from  
24 one of impartiality to one of advocacy. The fact that a  
25 defendant represents himself does not alter the judicial role nor  
26 does it impose any new obligation on the trial judge. The  
27 defendant under those circumstances must assume the  
28 responsibility for his inability to elicit testimony. As stated by

1 this court in *United States v. Dujanovic*, supra, 486 F.2d at  
2 188, ‘... one of the penalties of the appellant's  
3 self-representation is that he is bound by his own acts and  
4 conduct and held to his record’. (Citation.)” (*U.S. v. Trapnell*  
5 (9<sup>th</sup> Cir 1975) 512 F.2d 10, 12.)

6 (See Also *U.S. v. Cassagnol* (4<sup>th</sup> Cir. 1970) 420 F.2d 868, 879 [“The assumption by the  
7 judge of the burden of cross-examination of the accused in a criminal case by extensive  
8 interrogation may be reversible error. (Citations.).”])

9 Throughout the hearing on February 16, 2010, the Court has assumed the  
10 responsibility of examining witnesses on behalf of the debtors and thus assumed the role of  
11 advocate for debtors. While Rule 614(b) does permit the trial court to examine witnesses,  
12 it may not act as an advocate for any party.


13 In this instance, the examination of debtors’ witnesses has been exclusively by the  
14 Court. As set forth above, Rule 614(b) does not permitted such examination by the Court,  
15 even where the debtors are acting in pro per and the court is the trier of fact.

16  
17 **IV. CONCLUSION.**

18 For the foregoing reasons, Lone Oak renews its objection to the examination of  
19 witnesses by the Court on behalf of debtors and respectfully requests that the Court refrain  
20 from further examination of witnesses throughout the remainder of evidentiary hearing.

21 Dated: March 2, 2010

22 WOLF, RIFKIN, SHAPIRO, SCHULMAN &  
23 RABKIN, LLP

24 By:   
25 SIMON ARON  
26 RYAN J. STONEROCK  
27 Attorneys for Lone Oak Fund, LLC  
28

In re Benyam Mulugeta and Paula R. Mulugeta

Debtor and Debtor In Possession

CHAPTER 11

CASE NUMBER 09-01500-ASW

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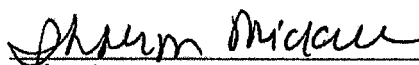
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March 2, 2010

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Sharon Mickell

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January 2009

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**CASE NO.: 09-51900 ASW**

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